IN THE MATTER OF TAHANSAN SDN. BHD.

[O.C.J. (Chan J.) January 17, 1984]
[Kuala Lumpur – Companies (Winding-Up) No. 33 of 1982]

Company Law – Winding-up of company – Just and equitable ground – Whether affairs of the company are being conducted in a manner oppressive to a member of the company – Whether directors have acted in their own interests rather than in the interest of members as a whole – Declaration as to shareholding of company – Companies Act, 1965, ss. 181, 218(1)(f), 218(1)(i) & 221.

Company Law – Shares – Declaration as to shareholding of company

In this case the company was incorporated with a capital of $100,000 divided into 100,000 shares of $1 each. The four persons who promoted the company were Tee Ah Kow, Mak Boon Seng, Chew Kee Hui and Ker Kim Tim, each of whom held 25,000 shares. In February 1980 the petitioner Tay Bok Choon joined the company when he bought the shares of Chew who retired from the company. Later Chew resigned as director and the petitioner and his son Tay Hock Yam were appointed directors. It was also agreed to increase the capital of the company to $200,000 by allotting to each of the four shareholders 25,000 shares. This meant that each of them – Tee, Mak, Ker and the petitioner had to contribute $25,000 and as a result of the new allotment each of them held 50,000 shares. Tee and Mak had to borrow $25,000 and $16,000 respectively from the petitioner. From the inception of the company all the shareholders were directors of the company but on November 27, 1981 the petitioner and Ker were removed as directors.

Although the petitioner's son, Tay Hock Yam, joined the company as a working director he received no shares in the company. So it was decided to transfer shares from Tee Ah Kow, Mak Boon Seng, Ker Kim Tim and the petitioner to Tan Hock Yam. Subsequently however this resolution was revoked and the transfer of the shares was not effected. The petitioner therefore asked for a declaration that the actual shareholding of the company was that Tee Ah Kow, Mak Boon Seng, Ker Kim Tim, the petitioner and his son each held 40,000 shares.

The company in its history did not pay any dividend but paid emoluments to the member-directors. It was only after the petition was presented that the company decided to declare dividends for the first time.

Held; (1) the position was that in substance a partnership existed between the four people. They were all directors and the only shareholders in the company. They all had an equal financial status in the company. In substance they were carrying on the business of the company as partners. The capital of the company was so owned as to make the company in substance a partnership;

(2) although the respondents were entitled in law to oust the petitioner from his directorship they could only do so subject to the petitioner's right to obtain equitable relief in the form of a winding up order;

(3) in this case the petitioner had succeeded in his claim that he was entitled to an order for winding up on the just and equitable ground under section 218(1)(i) of the Companies Act. However no case had been made for winding-up either on the ground that the affairs of the company were being conducted in an oppressive manner under section 181 of the Companies Act or that the directors of the company had acted in their own interests rather than in the interests of the members as a whole under section 218(1)(f) of the Companies Act;

(4) in this case the resolution of August 11, 1981 had no effect at all on the resolution that was passed on June 30, 1981 and therefore a declaration should be granted of the actual shareholding of the company.

Cases referred to:

(1) *In re Westbourne Galleries* [1973] A.C. 360.
(2) *Roberts Petroleum Ltd.* v. *Kenny Ltd.* [1983] 2 A.C. 192, 201.
(3) *Symington* v. *Symington's Quarries Ltd.* (1905) 8 F. (Court of Session) 121.
(4) *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426.
(5) *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783.
(6) *Thomson* v. *Drysdale* [1925] S.C. 311.
(7) *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch. 392.
(8) *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051.
(9) *In re Expanded Plugs Ltd.* [1966] 1 W.L.R. 514.
(10) *In re K/9 Meat Supplies (Guildford) Ltd.* [1966] 1 W.L.R. 1112.
(11) *In Straw Products Pty. Ltd* [1942] V.L.R. 222, 223.
(12) *In re Wondoflex Textiles Pty. Ltd* [1951] V.L.R. 458.
(13) *Tench* v. *Tench Brothers Ltd.* [1930] N.Z.L.R. 403.
(14) *In re Modern Retreading Co. Ltd.* [1962] E.A. 57.
(15) *In re Sydney and Whitney Pier Bus Service Ltd.* [1944] 3 D.L.R. 468.
(16) *In re Concrete Column Clamps Ltd.* [1953] 4 D.L.R. 60.
(17) *In re Davies and Collett Ltd.* [1935] Ch. 693.
(18) *In re A. & B.C. Chewing Gum* [1975] 1 W.L.R. 579.

COMPANIES WINDING-UP.

T. Thomas for the petitioner.
J. G. Bernatt for the respondents.

Cur. Adv. Vult.

Chan J.: I am told by Mr. Thomas for the petitioner that there appears to be no reported Malaysian or Singapore decision on the just and equitable provision for a winding-up order after *In re Westbourne Galleries*(1) was decided by the House of Lords in May 1972. That was a very important decision. Mr. Thomas calls it a landmark decision. As a result of it, the law on the winding up of companies on the just and equitable ground had to be rewritten in all the textbooks.

The reason why the cases did not find their way into the local law reports is because in most cases the decisions were given *ex tempore* – off the cuff, so to speak. *Ex tempore* judgments, even when reduced into writing, are not always useful. In fact, Lord Diplock's view in *Roberts Petroleum Ltd.* v. *Kenny Ltd.*[2] is very much to the point:

"Transcripts of the shorthand notes of oral judgments delivered since April 1951 by members of the Court of Appeal, nearly all *ex tempore,* have been preserved at the Royal Courts of Justice, formerly in the Bar Library but since 1978 in the Supreme Court library. For much of this period this course has been followed as respects all judgments of the civil division of the Court of Appeal, though recently some degree of selectivity has been adopted as to judgments to be indexed and incorporated in the bound volumes. Unreported judgments which have been delivered since the beginning of 1980 are now also included in the computerised data base known as Lexis and this has facilitated reference to them. Two such transcripts are referred to in the judgment of the Court of Appeal in the instant case. ... For my part, I gained no assistance from perusal of any of these transcripts. None of them laid down a relevant principle of law that was not to be found in reported cases; the only result of referring to the transcripts was that the length of the hearing was extended unnecessarily. This is not surprising. In a judgment, particularly one that has not been reduced into writing before delivery, a judge, whether at first instance or upon appeal, has his mind concentrated upon the particular facts of the case before him and the course which the oral argument has taken. This may have involved agreement or concessions, tacit or explicit, as to the applicable law, made by counsel for the litigating parties in what they conceived to be the interests of their respective clients in obtaining a favourable outcome of the particular case."

The petition in the present proceedings was brought under section 218(1) of the Companies Act 1965. This provision enables a winding-up order to be made if "the court is of the opinion that it is just and equitable that the company should be wound up." The clause has a long and chequered history in company law. It first appeared in section 5 of the English Joint Stock Companies Winding Up Act 1848. Lord Cross surveyed the historical development of the just and equitable provision in *In re Westbourne Galleries.* He said, at pp. 382 – 384:

"My Lords, the 'just and equitable' clause first appeared in section 5 of the Joint Stock Companies Winding Up Act 1848. Subsections (1) to (6) of that section gave the court jurisdiction to wind up a company in various circumstances indicative of insolvency; subsection (7) gave jurisdiction if the company had been dissolved or should have ceased to carry on business or should be carrying on business only for the purpose of winding up its affairs; and subsection (8) added: 'or if any other matter or thing shall be shown which, in the opinion of the court, shall render it just and equitable that the company should be dissolved.' The meaning of the subsection was considered by Lord Cottenham L.C. in 1849 in *Ex parte Spackman,* 1 Mac. & G. 170. In that case the company, which was a cattle insurance company, was not insolvent and was carrying on business; but the petitioners who held shares which were not fully paid up considered that its prospects were bad and that it might well become insolvent. The fact that some shareholders in a company take a pessimistic view of its prospects does not make it 'just and equitable' to wind it up against the wishes of the majority who take a more optimistic view and it is not surprising that the petition was dismissed; but in the course of his judgment Lord Cottenham L.C. expressed an opinion as to the scope of the subsection which had for many years an unfortunate influence on the practice of the Companies Court. He said, at p.174:

> 'This clause, was, no doubt, thus worded in order to include all cases not before mentioned; but of course it cannot mean that it should be interpreted otherwise than in reference to matters *ejusdem generis,* as those in the previous clauses. There must be something in the management and conduct of the company which shows the court that it should be no longer allowed to continue, and that the concern ought to be wound up.'

It is not in fact easy to see what precisely Lord Cottenham L.C. had in mind – for there may well be matters arising in the management of a company's affairs which make it 'just and equitable' that it should be wound up but which have no relation whatever either to insolvency or a cessation of business. Nevertheless, when the subsection reappeared as section 79(5) of the Companies Act 1862 the courts, with Lord Cottenham L.C.'s words 'ejusdem generis' in mind, for many years interpreted it very narrowly and only made orders under it if the substratum of the company had disappeared or it was a 'bubble' company which had never had a genuine substratum at all. Towards the end of the century the idea that the 'just and equitable' clause only covered situations which could be said to be somehow 'ejusdem generis' with the situations envisaged in the preceding subsections was gradually given up, but even in recent times judges have displayed a certain unwillingness to take the words at their face value and to apply them to new situations, which may well be an unconscious reflection of the restrictive interpretation which was put on them for so many years. In the present century, when the subsection became in turn section 129(6) of the Companies (Consolidation) Act 1908, section 168(6) of the Companies Act 1929 and section 22[2](f) of the Act of 1948, petitions brought under it have generally related to disputes between rival shareholders or groups of shareholders in private companies; and in many cases the parties to the dispute have stood to one another in a relationship analogous to that of partners in an unincorporated business. In some of the reported cases in which winding up orders have been made those who opposed the petition have been held by the court to have been guilty of a 'lack of probity' in their dealings with the petitioners. Thus in *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783 the managing director and majority shareholder was deliberately keeping the minority in ignorance of the company's financial position in order to acquire their shares at an under-value, and in *In re Davis & Collett Ltd.* [1935] Ch. 693 the holder of half the

shares had used his casting vote as chairman in order to bring in an additional director who would vote as he wished and then proceeded to oust the owner of the other half of the shares from any participation in the management of the company's business. But it is not a condition precedent to the making of an order under the subsection that the conduct of those who oppose its making should have been unjust or inequitable. This was made clear as early as 1905 by Lord M'Laren in his judgment in *Symington* v. *Symington's Quarries Ltd.*, 8 F. 121, 130. To the same effect is the judgment of Lord Cozens-Hardy M.R. in *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426, 431 – 432. It is sometimes said that the order in that case was made on the ground of 'deadlock.' That is not so. ... The reason why the petitioner succeeded was that the court thought it right to make the order which it would have made had Mr. Rothman and Mr. Weinberg been carrying on business under articles of partnership which contained no provision for dissolution at the instance of either of them. People do not become partners unless they have confidence in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the relationship should be ended – unless, indeed, the party who wishes to end it has been solely responsible for the situation which has arisen. The relationship between Mr. Rothman and Mr. Weinberg was not, of course, in form that of partners; they were equal shareholders in a limited company. But the court considered that it would be unduly fettered by matters of form if it did not deal with the situation as it would have dealt with it had the parties been partners in form as well as in substance.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves."

And this is Lord Wilberforce's analysis of the judicial development of the just and equitable provision in which he also set down signposts for its interpretation. He said, at pp.374 – 375:

"This power has existed in our company law in unaltered form since the first major Act, the Companies Act 1862. Indeed, it antedates that statute since it existed in the Joint Stock Companies Winding Up Act 1848. For some 50 years, following a pronouncement by Lord Cottenham L.C. [*Ex parte Spackman* (1849) 1 Mac. & G. 170, 174] in 1849, the words 'just and equitable' were interpreted so as only to include matters ejusdem generis as the preceding clauses of the section, but there is now ample authority for discarding this limitation. There are two other restrictive interpretations which I mention to reject. First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances. Secondly, it has been suggested, and urged upon us, that (assuming the petitioner is a shareholder and not a creditor) the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders.

One other signpost is significant. The same words 'just and equitable' appear in the Partnership Act 1892, section 25, as a ground for dissolution of a partnership and no doubt the considerations which they reflect formed part of the common law of partnership before its codification. The importance of this is to provide a bridge between cases under section 222(f) of the Act of 1948 and the principles of equity developed in relation to partnerships.

The winding-up order was made following a doctrine which has developed in the courts since the beginning of this century. As presented by the appellant, and in substance accepted by the learned judge, this was that in a case such as this the members of the company are in substance partners, or quasi-partners, and that a winding up may be ordered if such facts are shown as could justify a dissolution of partnership between them. The common use of the words 'just and equitable' in the company and partnership law supports this approach.''

Lord Wilberforce then went on to make some examination of the authorities. He referred to the Scottish decision in *Symington* v. *Symington's Quarries Ltd.*[3] the Court of Appeal's decision in *In re Yenidje Tobacco Co. Ltd.*[4] which was then the leading authority in England; and *Loch* v. *John Blackwood Ltd.*[5], where those authorities were reviewed, approved and extended overseas by the Judicial Committees of the Privy Council in an appeal from the West Indian Court of Appeal (Barbados). He also noted in passing the Scottish case of *Thomson* v. *Drysdale*[6]. He also considered the case of *In re Cuthbert Cooper & Sons Ltd.*[7] and found that the case should no longer be regarded as of authority. He mentioned *In re Lundie Brothers Ltd.*[8], *In re Expanded Plugs Ltd.*[9] and *In re K/9 Meat Supplies (Guildford) Ltd.*[10]. He continued, at p. 378:

"This series of cases (and there are others: In *re Davis & Collett Ltd.* [1935] Ch. 693; *Baird* v. *Lees*, 1924 S.C. 83; *Elder* v. *Elder & Watson*, 1952 S.C. 49; *In re Swaledale Cleaners Ltd.* [1968] 1 W.L.R. 1710; *In re Fildes Bros. Ltd.* [1970] 1 W.L.R. 592; *In re Leadenhall General Hardware Stores Ltd.* (unreported), February 4, 1971), amounts to a considerable body of authority in favour of the use of the just and equitable provision in a wide variety of situations, including those of expulsion from office. The principle has found acceptance in a number of Commonwealth jurisdictions. Though these were not cited at the Bar I refer to some of them since they usefully illustrate the principle which has been held to underlie this jurisdiction and show it applicable to exclusion cases."

He then referred to: *In re Straw Products Pty. Ltd.*[11] Mann C. J. at p.223; *In re Wondoflex Textiles Pty. Ltd.*[12] in New Zealand, *Tench* v.

Tench Bros. Ltd.[13], also *In re Modern Retreading Co. Ltd.*[14], a case of exclusion from management, and cf. *In re Sydney and Whitney Pier Bus Service Ltd.*[15] and *In re Concrete Column Clamps Ltd.*[16]

He concluded the review of the cases thus, at p. 379:

'My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. ... The superimposition of equitable considerations requires ... one, or probably more, of the following elements:

(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company;

(ii) an agreement, or understanding, that all, or more (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business;

(iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."

I come to the facts of this case. The company Tahansan Sdn. Bhd. was incorporated in 1977. The capital of the company was $100,000 divided into 100,000 shares of $1 each. The four people who took part in the promotion of the company were Mr. Tee Ah Kow, Mr. Mak Boon Seng, Mr. Chew Kee Hui and Mr. Ker Kim Tim and each of them held 25,000 of those shares.

The petitioner, Mr. Tay Bok Choon, joined the company in February 1980 when he bought out the shares of Mr Chew who was retiring from the company. At a board meeting on February 29, 1980, Mr. Chew resigned as director and the petitioner and his son, Mr. Tay Hock Yam, were appointed directors of the company. Also, at that meeting, it was decided to increase the capital of the company to $200,000 and this was carried out into effect by allotting to each of the four shareholders 25,000 shares. This meant that each of them – Mr. Tee, Mr. Mak, Mr. Ker and the petitioner – had to contribute $25,000. As a result of this new allotment, each of them now holds 50,000 shares in the company. To pay for the shares Mr. Tee and Mr. Mak had to borrow from the petitioner. Mr Tee borrowed $25,000 and Mr Mak $16,000.

Ever since its inception in 1977, all the shareholders of the company, and there were only four of them, have been directors of the company. When the petitioner joined the company, he also became a director of the company. They were partners as well as directors and they have always participated in the management of the company. This is admitted: see the affidavit of Mr. Tee dated July 6, 1982 where he says at paragraph 24 – "The directors managed the company in accordance with existing rules and regulations, ..." and a little further on in paragraph 26, he admits that the petitioner was no longer represented in the management of the company; this was made in response to the petitioner's complaint that he was removed as a director on November 27, 1981. In its history, the company had never paid any dividend. They were supposed to pay to the member-directors emoluments: see the exhibit TAK-10 which is attached to the affidavit of Mr. Tee dated November 8, 1982. It was only after the petition was presented – on April 9, 1982 – that the company decided to declare dividends for the first time. The resolution was passed by one of the respondents, Mr. Tee and Mr. Mak on August 5, 1982 (see exhibit TAK-10) and it was said to be a final dividend for the year 1981. The petitioner claimed that he did not receive any notice of the meeting, but his counsel, Mr. Thomas, conceded that the petitioner had notice of it. In my view, the late declaration of dividends was made for the purpose of the present litigation. Perhaps the respondents thought that the step would help their case. I am satisfied that there was an arrangement to pay emoluments to the member-directors.

The position, therefore, was that in substance

a partnership existed between these four people. They were all directors and the only shareholders in the company. They all had an equal financial stake in the company. In substance they were carrying on the business of the company as partners. The capital of the company was so owned as to make the company in substance a partnership.

In *In re Lundie Brothers Ltd.*[8], the company was a small printing company which was formed in 1950 to take over the business which two brothers, the Lundie brothers, had started soon after the war. The capital of the company was £1,000, divided into 20,000 shares of 1 shilling each. They were held by the two Lundie brothers and two customers of the old business, the Palfreys. Each of the four held 5,000 shares and was a director of the company. In 1956, one of the Palfreys retired from the company and the petitioner, Mr. Blackmore, joined the company by buying out the retiring Mr. Palfrey – just as the petitioner in the present case had bought out the retiring Mr. Chew. In 1958, the other Mr. Palfrey retired, and he was bought out by Mr. Blackmore and the two Lundie brothers and "the position in substance was that there was a partnership between the petitioner and the two Lundie brothers": per Plowman J., at 1054-55;

In *In re Davis and Collett Ltd.*[17], the company had a capital of £200 divided into 400 shares of 10 shillings each. Mr. Davis and Mr. Collett were the first directors. Mr. Collett resigned in December 1932. In October 1933, the petitioner, Mr. Golding, was appointed as a director and in February 1934 the capital of the company was increased to £400 and the petitioner and Mr. Davis became the holder of 400 shares of 10 shillings each. It was held by Crossman J. that the capital of the company was so owned as to make the company in substance a partnership. He said, at p. 701:

"I find that the company is a private company in the fullest possible sense, and that the petitioner and the respondent hold the capital of the company substantially in equal shares. On the authorities, and particularly *In re Yenidje Tobacco Co.* [1916] 2 Ch. 426 I am bound now to consider the position in the same way as I should consider it if the question arose as to the right of one of two partners in a private partnership to have the partnership dissolved. The same circumstances which entitled a partner to require the dissolution of a partnership entitle a person who is equally interested with one other person in a company to have that company wound-up on the ground that the circumstances render it just and equitable."

Although in *In re Westbourne Galleries* there was a pre-existing partnership, it need not be so in every case. Lord Wilberforce said in that case, at pp.379 – 380: "And in many, but not necessarily all, cases there has been a pre-existing partnership". *In re Lundie Brothers Ltd.*[8] and *In re Davis and Collett Ltd.*[17] are two cases where there was no question of a previous partnership between the petitioner and the other members of the company before he came into the company. In *re A. & B.C. Chewing Gum*[18] the petitioner Topps Chewing Gum Inc. joined the company by buying one third of the shareholding in A. & B.C. Chewing Gum Ltd.; no question here of a pre-existing partnership.

In re Yenidje Tobacco Co. Ltd.[4] is a case where two traders decided to join forces. In that case, Mr. Rothman and Mr. Weinberg, who traded separately as tobacconists and cigarette manufacturers, agreed to amalgamate their businesses and in order to do so formed a private limited company in which they were the only shareholders and directors. Both of them had equal voting powers and the articles provide that one director shall form a quorum. This is what Lord Cozens-Hardy M.R. said, at p.429:

"I think it right to consider what is the precise position of a private company such as this and in what respects it can be fairly called a partnership in the guise of a private company."

And he continued at pp.431 – 432:

"I have treated it as a partnership, and under the Partnership Act of course the application for a dissolution would take the form of an action; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form or the guise of a private company? It is a private company, and there is no way to put an end to the state of things which now exists except by means of a compulsory order . ... I think that in a case like this we are bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company."

This was followed by Warrington L.J. who said, at p. 434:

"In substance, therefore, it seems to me these two people are really partners. It is true they are carrying on the business by means of the machinery of a limited company, but in substance they are partners; the litigation in substance is an action for dissolution of the partnership, and I think we should be unduly bound by matters of form if we treated either the relations between them as other than that of

partners or the litigation as other than an action brought by one for the dissolution of the partnership against the other; but one result which of course follows from the fact that there is this entity called a company is that, in order to obtain what is equivalent to a dissolution of the partnership, the machinery for winding up has to be resorted to."

The effect of *In re Yenidje Tobacco Co. Ltd.*[4] is this – as was put by Plowman J. in *In re Lundie Brothers Ltd.*,[8] at p.1056B –

"[In *In re Yenidje Tobacco Co. Ltd.*], the Court of Appeal decided that in a case where in substance a partnership exists between the persons who are carrying on the business of the company, any ground which would justify an order for the dissolution of a partnership, had it been a partnership, will justify an order for the winding up of the company."

In the present case, matters came to a head on November 27, 1981 when a resolution was passed at a meeting of directors removing the petitioner and Mr. Ker as directors. The petitioner's complaint is that he has been excluded from directorate or management participation. Mr. Thomas says that this is an exclusion case and applying *In re Lundie Brother Ltd.* and *In re Westbourne Galleries*,[1] the petitioner is entitled to an order for winding up. Mr. Bernatt says that the petitioner was removed under powers expressly conferred by the Companies Act and the articles. As I have already said, this is in substance a partnership case and in a case such as this, as was said by Plowman J., any ground which would justify an order for the dissolution of the partnership, had it been a partnership, would justify an order for the winding up of the company.

I propose to consider first *In re Westbourne Galleries.*[1] The effect of the decision is this, and here I think I should follow the language of Plowman J. in *In re A. & B.C. Chewing Gum.*[18] He said, at p.590:

"In *[In re Westbourne Galleries]* it was held by the House of Lords that it is wrong to create categories or headings under which cases must be brought if the just and equitable principle is to apply; the generality of the words 'just and equitable' is not to be reduced in that way. It was also held that although the just and equitable provision did not entitle one party to disregard the obligations he had assumed by entering the company, nor entitle the court to dispense him from them, it did entitle the court to subject the exercise of legal rights to equitable considerations."

I can now refer to this passage by Lord Wilberforce in *In re Westbourne Galleries*,[1] p.380:

"The question is, as always, whether it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s). The law of companies recognises the right, in many ways, to remove a director from the board. Section 184 of the Companies Act 1948 confers this right upon the company in general meeting whatever the articles may say. Some articles may prescribe other methods: for example, a governing director may have the power to remove (compare *In re Wondoflex Textiles Pty. Ltd.* [1951] V.L.R. 458). And quite apart from removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be opposed and defeated by a majority, or even by a casting vote. In all these ways a particular director-member may find himself no longer a director, through removal, or non-re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or *mala fides*. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved. And the principles on which he may do so are those worked out by the courts in partnership cases where there has been exclusion from management (see *Const* v. *Harris* (1824) Tur. & Rus. 496, 525) even where under the partnership agreement there is a power of expulsion (see *Blisset* v. *Daniel* (1853) 10 Hare 493; *Lindley* on Partnership, 13th ed. (1971), pp. 331, 595)."

Lord Wilberforce then went on to say thus (pp. 380 – 381):

"[Mr Ebrahimi] was removed from his directorship under a power valid in law. Did he establish a case which, if he had remained in a partnership with a term providing for expulsion, would have justified an order for dissolution? This was the essential question for the judge. Plowman J. dealt with the issue in a brief paragraph in which he said [1970] 1 W.L.R. 1378, 1389:

'... while no doubt the petitioner was lawfully removed, in the sense that he ceased in law to be a director, it does not follow that in removing him the respondents did not do him a wrong. In my judgment, they did do him a wrong, in the sense that it was an abuse of power and a breach of the good faith which partners owe to each other to exclude one of them from all participation in the business upon which they have embarked on the basis that all should participate in its management. The main justification put forward for removing him was that he was perpetually complaining, but the faults were not all on one side and, in my judgment, this is not sufficient justification. For these reasons, in my judgment, the petitioner, therefore, has made out a case for a winding up order.'

... I take [this] as a finding that the respondents were not entitled, in justice and equity, to make use of their legal powers of expulsion and that, in accordance with the principles of such cases as *Blisset* v. *Daniel*, 10 Hare 493, the only just and equitable course was to dissolve the Association."

Just as in the present case, the petitioner was

removed from his directorship under a power valid in law. But the respondents did do him a wrong by excluding him from participation in the conduct of the business upon which they have embarked on the basis that all should participate in its management. In my judgment, I have come to the conclusion that I ought to make an order for winding up. The removal of the petitioner from his directorship was an unjustified exclusion of him from the partnership business. As was put by Lord Wilberforce, the entitlement to management participation is an obligation so basic that, if broken, the conclusion must be that the association must be dissolved. As was said by Lord Cross, in the same case, at pp.386 – 387:

"Had no company been formed Mr. Ebrahimi could have had the partnership wound up and though Mr. Nazar and his son were entitled in law to oust him from his directorship and deprive him of his income they could only do so subject to Mr. Ebrahimi's right to obtain equitable relief in the form of a winding up order under section 222(f)."

I think those words are as true and applicable to the present case and though the respondents were entitled in law to oust the petitioner from his directorship they could only do so subject to the petitioner's right to obtain equitable relief in the form of a winding up order. The just and equitable provision does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way: per Lord Wilberforce, p.379:

Mr Ebrahimi, in that case – and, as much, the petitioner, in this, –

"through ceasing to be a director, lost his right to share in the profits through directors' remuneration, retaining only the chance of receiving dividends as a minority shareholder. It is true that an assurance was given in evidence that the previous practice (of not paying dividends) would not be continued, but the fact remains that Mr. Ebrahimi was thenceforth at the mercy of the Messrs. Nazar as to what he should receive out of the profits and when. He was, moreover, unable to dispose of his interest without the consent of the Nazars. All these matters lead only to the conclusion that the right course was to dissolve the association by winding up." – *per* Lord Wilberforce, p.381.

"... the result of Mr. Ebrahimi's removal from the directorship" said Lord Cross, at p.386 "was that instead of his having a share in the management of the business and an income of some £3,000 a year he was excluded from the management and deprived of any share in the profits save such dividend as might be paid on his shares if the Nazars thought fit to declare a dividend."

The above remarks would apply just as easily to the present case. Not only did the respondents deprive the petitioner of his salary, they have voted an increase to their own salaries from $1,500 to $2,500 a month as from June 1, 1982: see the exhibit TAK-10.

The other case to which I refer is *In re Lundie Brothers Ltd.* This is a case where the company was held to resemble a partnership. The petitioner, one of three shareholders and directors, was removed from his directorship and excluded from directors' remuneration. The facts, therefore, closely resembled those in the present case. The decision was approved in *In re Westbourne Galleries.*[1] Lord Cross said, at p.387: *"In re Lundie Brothers Ltd.*[8] was, like this, an 'exclusion' case. Plowman J. was I think right in that case, as in this, to make a winding up order."

These two cases, *In re Westbourne Galleries*[1] and *In re Lundie Brothers Ltd.*,[8] were, like this case is, exclusion cases. It is right here, as it was in those cases, to make a winding up order.

I note in passing *In re Expanded Plugs Ltd.*[9] The case was disapproved by the House of Lords in *In re Westbourne Galleries.*[1] This is what Lord Wilberforce said, at p.377:

"The case itself is a paradigm of obscure forensic tactics and, as such, of merely curious interest; its only importance lies in the statement, contained in the judgment, at p.523, that since the relevant decisions were carried out within the framework of the articles the petitioner must show that they were not carried out *bona fide* in the interests of the company. ... I should say at once that I disagree with it."

He expressed the view against this attempt at limiting the scope of the just and equitable provision, thus, at p.381:

"This formula *'bona fide* in the interests of the company' is one that is relevant in certain contexts of company law and I do not doubt that in many cases decisions have to be left to majorities or directors to take which the courts must assume had this basis. It may, on the other hand, become little more than an alibi for a refusal to consider the merits of the case, and in a situation such as this it seems to have little meaning other than 'in the interests of the majority.' Mr. Nazar may well have persuaded himself, quite genuinely, that the company would be better off without Mr. Ebrahimi, but if Mr. Ebrahimi disputed this, or thought the same with reference to Mr. Nazar, what prevails is simply the majority view. To confine the application of the just and equitable clause to proved cases of *mala fides*

would be to negative the generality of the words. It is because I do not accept this that I feel myself obliged to differ from the Court of Appeal."

As I have said, I am satisfied that the petitioner has succeeded on his claim that he is entitled to an order for winding up on the just and equitable ground under section 218(1)(i). But that does not mean that a case was made out on section 181. To do that, "He has to go further" – to use the words of Plowman J. when speaking of the English section 210 in *In re Lundie Brothers Ltd.*[8] at p.1057E – "and satisfy me that at the date of the presentation of this petition the affairs of the company were being conducted in a manner oppressive to him as a member of the company." He continued thus (pp. 1057-8):

" 'As a member of the company' means, of course, as a shareholder of the company. The distinction between the sort of case which a petitioner has to make out in order to establish a claim for dissolution on a just and equitable ground, in a partnership case, and the sort of case which he has to establish to succeed under section 210 was mentioned by Lord Keith in his judgment in the Scottish case *Elder* v. *Elder* 1952 S.C. 49 and the passage I have in mind is a passage which was adopted by Jenkins L.J. in *Harmer (H.R.) Ltd.* [1959] 1 W.L.R. 62; [1958] 3 All E.R. 689. The passage is (1952 S.C. 49, 60): 'It is not lack of confidence between shareholders per se that brings section 210 into play, but lack of confidence springing from oppression of a minority by a majority in the management of the company's affairs, and oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary right as a shareholder. Cases like that of *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783; 40 T.L.R. 732 P.C., and *Thomson* v. *Drysdale* 1925 S.C. 311 might, I think, readily have come under section 210. I doubt whether a case like *Yenidje Tobacco Co.* [1916] 2 Ch. 426 could be brought under the section.'

In other words, the petitioner has to go beyond making out a case for winding-up on the *Yenidje Tobacco Co. Ltd.* principle, and establish some element of lack of probity or fair dealing to him in his capacity as a shareholder in the company.

In my judgment he has wholly failed to do that. His main grievance is, as he admitted in the witness box, that he has been ousted as a working director. That, it seems to me, has nothing to do with his status as a shareholder in the company at all. The same thing is equally true in regard to his complaint that his remuneration as a director of the company has been reduced. That relates to his status as a director of the company, and not to his status as a shareholder of the company."

The fact that the petitioner in the present case was ousted as a director and that he was deprived of his directors' remuneration relates only to his status as a director, and not to his status as a shareholder. The court, therefore, is not given jurisdiction in a situation like this to make an order under section 181.

This is how it was put by Lord Cross in *In re Westbourne Galleries,*[1] at p. 385H:

"To give the court jurisdiction under this section [210] the petitioner must show both that the conduct of the majority is 'oppressive' and also that it affects him in his capacity as a shareholder. Mr. Ebrahimi was unable to establish either of these preconditions. But the jurisdiction to wind up under section 222(f) continues to exist as an independent remedy".

In the same way, the jurisdiction to wind up under our section 218(1)(i) exists as an independent remedy.

Similarly, the jurisdiction to make an order under section 218(1) (f) to wind up the company also continues to exist as an independent remedy. This provision says that an order may be made in cases where directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner which appears to be unfair or unjust to other members. But the removal of the petitioner as a director which resulted in his being deprived of directors' remuneration in the present case cannot be said to be a matter which concerns the interests of the members generally, nor can it be said that the directors have acted in a way which could be said to be unfair or unjust to any member or members. The interests of the petitioner as a member were unaffected. And neither was there anything done by the directors which would make it look like unfair or unjust conduct or treatment to the petitioner as a member. Neither the fact that his interests as a director were affected nor that he was badly treated as a director was relevant.

In the end, I have come to the conclusion that I ought to make an order on section 218(1)(i) for winding up on the just and equitable ground. For the reasons which I have given, I am satisfied that no case has been made out either on section 181 or section 218(1)(f).

That brings me to the claim for a declaration. Mr. Thomas says that the court has jurisdiction to make such an order in a petition for winding up: see section 221(1). The effective words are, "On hearing a winding up petition the Court may ... make any ... other order that it thinks

fit". He asks for a declaration that the actual shareholding of the company is now:

Mr. Tee Ah Kow	–	40,000 shares
Mr. Mak Boon Seng	–	40,000 shares
Mr. Ker Kim Tim	–	40,000 shares
Mr. Tay Bok Choon (the petitioner)	–	40,000 shares
Mr. Tay Hock Yam (his son)	–	40,000 shares

The facts are these. Although the petitioner's son, Mr. Tay Hock Yam, joined the company in February 1980 as a working director he held no shares in the company. So on June 1, the members-directors of the company decided to give him a stake in the company. These are the words taken from the minutes of that meeting:

"It was resolved that in order to let Mr TAY HOCK YAM have some interest in the Company, the Company shall consider that TEE AH KOW and TAY BOK CHOON shall sell their respective 10,000 shares to TAY HOCK YAM, and MAK BOON SENG and KER KIM TIM shall hold their respective 10,000 shares in trust for TAY HOCK YAM. The payment [for the shares] shall be arranged by the respective parties. The actual transfer of the shares or Trust Deed shall be decided in 1981."

The trust provision was put in because Mr. Ker was afraid then that the Tays (the petitioner and his son) and Mr. Tee (supposedly a distant relative of the petitioner) would together hold 60% of the shares. So Mr. Ker suggested that Mr. Tee and the petitioner should transfer 10,000 shares each to the younger Mr. Tay and Mr. Ker and Mr. Mak would hold 10,000 shares each in trust for him.

At a meeting of directors on June 30, 1981, the transfer of the shares was approved. It would seem that this time Mr. Ker did not think that a trust was necessary. The following is taken from the minutes of that meeting:

"Tranfer of shares

The Company hereby approve the following transfer of shares:

from Tee Ah Kow to Tay Hock Yam	..	10,000 shares
from Tay Bok Choon to Tay Hock Yam	..	10,000 shares
from Mak Boon Seng to Tay Hock Yam	..	10,000 shares
from Ker Kim Tim to Tay Hock Yam	..	10,000 shares"

The position is plain enough. Clearly, the company was bound to register the transfer of the shares. However, before the mechanics for the registration of the shares could be effected, a resolution was passed on August 11, 1981 revoking the resolution which had approved the transfer of the shares to Mr. Tay. I do not think that the respondents should be allowed to do that. They gave as their reason that there is a condition on the manufacturing licence requiring 75% of the shares of the company to be held by Malaysians. The respondents say that since the petitioner and Mr. Tay are Singapore citizens, the transfer of the shares to Mr Tay based on the June 30, 1981 resolution would reduce the shares held by Malaysians to less than 75%. This would contravene the condition on the licence and could result in its cancellation.

Ever since the formation of the company, the business of the company has always been that of the business of a manufacturer of window louvres. These were made at their factory at No.82 Jalan Midah, Taman Midah, Jalan Cheras, Kuala Lumpur. The licence, which was the cause for the annulment of the approval for the transfer of the shares to Mr. Tay, was a licence for the company to manufacture sewing machine stands (pressed metal parts) on a jobbing basis at their new factory in Bangi, Selangor. This licence had nothing whatsoever to do with the business of manufacturing window louvres which was being carried on by the company at their Jalan Cheras factory. It is not for me for say what effect the supposed infringement would have on the manufacturing licence, but no matter how real the danger is of losing the licence for the factory in Bangi, it is, to my mind, not good enough an excuse for this court to give countenance to the respondents to go back on their agreement to transfer the shares to Mr. Tay. It would not be right, in justice and equity, to allow the respondents to renege on what they have authorised merely in order to preserve the benefit of the licence for the company. Had Mr. Tay brought an action for specific performance, he would have succeeded. In the result, I hold that the resolution of August 11, 1981 has no effect at all on the resolution that was passed on June 30, 1981. I, therefore, grant the declaration that was sought.

As for the licence for the manufacture of window louvres at the factory at Jalan Cheras, there was no such condition. However, there was an attempt to impose the condition on the licence: see the letter from the Licensing Authority referred to as exhibit TAK-4. That letter was written in response to the company's application for the

licence for their Bangi factory. The relevant part of the letter reads:

"Application for a Factory Licence under Section 3, Industrial Co-ordination Act 1975

I have been directed to refer to your application in connection with the above matter and forward herewith the above-mentioned Licence which has been approved by the Licensing Officer. The details of the factory licence are as follows:

Licence No: A 001573 Serial No. A 002221.
Effective date of licence: 10th October, 1980
Factory Lot: Bangi industrial area, Selangor.
Products: 'Sewing Machine stands; Pressed metal parts on a jobbing basis'

Please be informed that the conditions on equity participation in your Factory Licence No. 000779 dated February 22, 1978 have been amended as follows:

At least 75% of the shares of this company must be bought and held by Malaysian citizens including at least 20% to be reserved and the company shall consult the Ministry of Trade and Industry before the allotment of the reserved shares."

What was said in that last paragraph was an attempt to add on an additional condition to the licence for the Jalan Cheras factory. The licensing officer had no right to do that. He could not act unilaterally to change the conditions on a licence. He could only do so, "after consultation with the manufacturer". This has not been done. This is what section 4(4) of the Industrial Co-ordination Act 1975 (as amended) says:

"The licensing officer in issuing a licence, may, in furtherance of the aforesaid objectives impose such conditions as he may think fit and such conditions may be varied on the application of the manufacturer or on the licensing officer's own motion after consultation with the manufacturer in respect of whom the conditions in the licence are to be varied."

I can only go by the evidence before me and on the evidence there is nothing that would show that the company was ever consulted before the new condition was added on the Jalan Cheras factory licence. The officer had acted beyond his authority. The condition had no validity. There is, therefore, no real risk of the Jalan Cheras factory losing its licence by the transfer of the shares to Mr. Tay.

Actually, the problem is more imagined than real. The question whether there is a possibility of losing the licence or both the licences is purely an academic one. That that is so is because I have already ordered a winding up on the just and equitable ground. The company is in liquidation. They do not need the licences anymore. It did not matter a jot if they were cancelled. The declaration is useful only for the purpose of distributing the assets of the company by the liquidator to the member-partners.

[Mr. Bernatt then applied on behalf of the respondents for a stay to be granted on the order winding up the company.]

Chan J.: Mr. Thomas points out that as a matter of practice, a stay is never granted. He refers to the judgment of Plowman J. in *In re A. & B.C. Chewing Gum*[18] at pp.592 – 593. This is what the judge said:

"As I understand it, the position is this. First of all, as a matter of jurisdiction it is quite clear that I have jurisdiction to grant a stay, because the Act says so. It says I can grant a stay on proof to my satisfaction that the proceedings ought to be stayed. But then there is the question of practice, and as a matter of practice a stay is never granted. The only exception that I think is known to the department is where I myself once went wrong in *In re Westbourne Galleries Ltd.* [1970] 1 W.L.R. 1378, and not having been alerted to the position, and not knowing it before, I granted a stay, with precisely what consequences nobody has ever told me. But there are very good reasons for the practice of never ordering a stay, and they are these: as soon as a winding up order has been made the Official Receiver has to ascertain first of all the assets at the date of the order; secondly, the assets at the date of the presentation of the petition, having regard to the possible repercussions of section 227 of the Act of 1948; and thirdly, the liabilities of the company at the date of the order, so that he can find out who the preferential creditors are, and also the unsecured creditors.

Supposing there is an appeal and the winding up order is ultimately affirmed by the Court of Appeal, and there has been a stay, his ability to discover all these things is very seriously hampered: it makes it very difficult for him, possibly a year later, to ascertain what the position was at different times a year previously. But assuming a stay is not granted, if the business is being carried on at a profit, as I understand this business now is, no additional harm is done by refusing a stay. As I understand it, if the Official Receiver is given an indemnity, say by the Coakley brothers, who are running this business, he will allow it to be carried on, and the Coakley brothers, in this case, could be appointed special managers and carry on the business as they have been doing. If the business is being carried on at a profit, creditors of the business, after the date of the winding up order, would be paid in priority to the unsecured creditors at the date of the order as part of the expenses of the winding up. Then, if the appeal is allowed, the business is handed back as a going concern,

it has not suffered any loss. Of course, if the business can only be carried on at a loss – it should not be carried on at all.

Those, I think, are really the reasons why, in practice, a stay is not granted – a profitable business can be carried on as it was before and handed back as a going concern if the appeal is allowed. If it is not allowed then, of course, cadit quaestio."

As here, the Act gives jurisdiction to grant a stay (section 243), but as a matter of practice a stay is never granted. The reasons for the practice are expressed in the cogent judgment of Plowman J. from the passage which I have just read. I endorse those views and refuse to grant a stay.

Order accordingly.

Solicitors: *Skrine & Co.; Baharuddin, Bernatt, Tan & Ker.*

A. PERIANAYAGAM & ANOR. v. YEO SUAN TIN & ANOR.

[O.C.J. (Siti Norma Yaakob J.) February 17, 1984]
[Kuala Lumpur – Civil Suit No. 1771 of 1975]

Road Traffic – Fatal accident – Liability – Car went out of control when tyre burst – Defendants absolved from any blame whatsoever.

The fatal accident in this case involved three vehicles, a motor cycle ridden by the deceased with his brother-in-law as pillion, a car driven by the first defendant and another car driven by the second defendant. All three vehicles were proceeding from the direction of Klang towards Kuala Lumpur. At that particular stretch, the Highway has three lanes on one side with a central divider that separates traffic coming from the opposite direction. There is also a side road to the left and immediately opposite this there is a break in the divider to allow cars from Klang to either make a U-turn at the break and proceed back towards Klang or cross the other side of the Highway towards another side road immediately facing the divider. The deceased was heading for this side road and had intended to turn right at the break in the divider, cross the other side of the Highway and proceed into the side lane. He did not however make it to the side road as his motor cycle was collided into by the first defendant and after he had fallen onto the road, the 2nd defendant ran over him.

Held: from the evidence and in all probability, the accident could only have happened because the deceased shot out from the side road right into the path of the defendants and for this foolhardiness, the defendants should be absolved from any blame whatsoever.

[**Editorial Note:** The plaintiffs have appealed against the above Judgment to the Federal Court in Federal Court Civil Appeal No. 8 of 1984 and dated April 4, 1984. The appeal is pending.]

CIVIL SUIT.

C.H. Koh (*C.C. Choo* with him) for the plaintiffs.

Miss Rasamani Kandiah for the first defendant.

Miss Anusha Santhirasthipam for the second defendant.

Cur. Adv. Vult.

Siti Norma Yaakob J.: The fatal accident leading to this cause of action happened at the 12th mile, Federal Highway on October 15, 1972 at about 5.45 p.m. It involved three vehicles, a motor cycle ridden by the deceased with his brother-in-law as pillion, a car driven by the first defendant and another car driven by the second defendant. All three vehicles were proceeding from the direction of Klang towards Kuala Lumpur. At that particular stretch, the Highway has three lanes on one side with a central divider that separates traffic coming from the opposite direction. There is also a side road to the left which is marked as 'P' in the sketch plan, AB.4, and immediately opposite 'P' there is a break in the divider to allow drivers coming from Klang to either make a U-turn at the break and proceed back towards Klang or cross the other side of the Highway towards another side road immediately facing the divider. The deceased was heading for this side road and had intended to turn right at the break in the divider, cross the other side of the Highway and proceed into the side lane. He did not however make it to the side road as his motor cycle was collided into by the first defendant and after he had fallen onto the road, the 2nd defendant ran over him.

According to the deceased's brother-in-law, P.W.2, they had left the deceased's home in Klang on the deceased's motor cycle. Before approaching the break in the divider, they had crossed from the left lane to the lane nearest the divider and at that point of time, P.W.2 had turned back and saw the 1st defendant's car approaching 300 feet behind. They reached the lane near the divider safely, proceeded for another 100 feet and just when they were about to turn right into the break in the divider, the first defendant's car knocked into the rear of the motor cycle, throwing both the machine and its passengers to the road. P.W.2 managed to crawl to the divider and the next thing he saw was the deceased standing up on the road and the 2nd defendant's car running right into him.